



**REMARKS OF KEITH E. GOTTFRIED
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**PRESENTED AT THE
HOUSING AND DEVELOPMENT LAW INSTITUTE
2006 SPRING CLE CONFERENCE
KEYNOTE LUNCHEON
THURSDAY, MAY 4, 2006,
12:00 P.M., LOCAL TIME
WEST END BALLROOM OF THE WASHINGTON MARRIOTT HOTEL
WASHINGTON, D.C.
[as prepared for delivery]**

Good afternoon.

Thank you _____ for that generous and very kind introduction.

I would like to start by thanking the Housing and Development Law Institute for the opportunity to speak to you today. President Mattye Gouldsby Jones, Vice President Mary McKenzie James, Secretary-Treasurer Barbara Huppee and the distinguished members of the Board of Directors are to be commended for all the work they do. The HDLI has served as a legal resource for public housing agencies for over 20 years and HUD is grateful for their significant contribution and hopes to continue working with them well into the future. I also would like to sincerely thank Lisa Walker, the Executive Director and General Counsel of HDLI for the incredible work she and her staff do and for putting this conference together.

Since being sworn in as General Counsel of HUD, I have had the opportunity to meet with many leaders in our housing community. I was in HUD's Boston Region recently and had the opportunity to meet with Hollis Young and Sandra Henriquez, the General Counsel and Administrator of the Boston Housing Authority.

Last week Ricardo Morales and Doug Apple, the General Counsel and General Manager of the New York City Housing Authority were kind enough to visit me at my office in Washington, D.C. It was great to spend time together with them and provided me with a fantastic learning opportunity.

As is the case with all of HDLI's conferences, this conference will provide a wonderful opportunity for all of us involved in housing issues to network and share ideas on how to more effectively serve our clients and, ultimately, how to better provide our communities with access to affordable housing.

I am pleased to be here with so many of our country's leading housing professionals, from both the private and public sectors. I look forward to having a chance to meet each of you and I look forward to working with you over the next few years.

We've already heard from two outstanding leaders at HUD who I'm privileged to call colleagues: Orlando Cabrera, Assistant Secretary for Public and Indian Housing and Kim Kendrick, Assistant Secretary for Fair Housing and Equal Opportunity. HUD is fortunate to have Assistant Secretaries like Orlando and Kim who have such extensive, hands-on experience with housing issues – Orlando in Florida and Kim here in Washington, D.C.

In addition, I'm very proud that we were able to coordinate HUD's Regional Counsel meeting with HDLI's conference so that we could maximize HUD's participation here. From New York we have John Cahill, Miniard Culpepper from Boston, Ann Harrison, Philadelphia, Donnie Murray, Atlanta, Courtney Minor, Chicago, William Daley, Fort Worth, Thomas Coleman, Kansas City, Ellen Dole and William Elsbury from Denver, Fay Austin, San Francisco, and David Morado from Seattle.

As many of you may be aware, the HUD Office of General Counsel is a nationwide organization of close to 400 attorneys and 300 non-attorneys with headquarters in Washington, D.C., 10 regional offices and close to 40 field offices around the country. The HUD Office of General Counsel is the largest legal office in the world dedicated to providing legal advice on housing and urban development issues. I

am extremely honored to be able to serve as General Counsel at HUD and am very grateful to President Bush and Secretary Jackson for the trust and confidence they have placed in me.

I'd also like to say a few words about Secretary Jackson and Deputy Secretary Bernardi. We are very fortunate to have at HUD's helm two leaders who understood public housing long before they came to HUD. Secretary Jackson knows public housing. As many of you know, Secretary Jackson is the first HUD Secretary to ever run a public housing authority. He managed the Housing Authorities in St. Louis, Washington, D.C. and Dallas and brings a unique perspective to HUD. As many of you may also know, Deputy Secretary Bernardi is the former Mayor of Syracuse, New York where he worked tirelessly to make Syracuse a more vibrant urban center and to draw families back into that city through home-ownership programs. When it comes to public housing they both understand the complexities and the flexibility that is required. But most importantly, the Secretary and Deputy Secretary, along with all of the dedicated individuals at HUD, realize that the residents whom public housing serves are, and will continue to be, our greatest concern.

As Secretary Jackson continues to lead HUD in strengthening our nation's communities, promoting affordable housing, dismantling the barriers to home ownership, expanding homeownership opportunities for all Americans, particularly low and moderate income families, meeting President Bush's goal of at least 5.5 million new minority homeowners before the end of the decade, ending chronic homelessness, vigorously enforcing fair housing, civil rights and anti-discrimination laws, and, of course, providing housing and other desperately-needed relief to the victims of Hurricanes Katrina, Rita and Wilma, it is for me the honor of a lifetime to serve as HUD's General Counsel and to assist the Secretary in fulfilling his agenda.

The position of General Counsel at HUD is a wonderful opportunity and a tremendous challenge, but it is a position I believe that I have been preparing for my whole life. For those of you who don't know me, I have spent the last two decades in the accounting and auditing business, the legal business and, most recently, the computer software business. Today, when folks ask me what I do for a living I tell them I am in the "hope business" because that is the "business" of

HUD – helping people realize their dream of affordable housing and home ownership. Serving as the General Counsel of HUD has been the most rewarding position I have ever held – not rewarding financially but truly rewarding personally.

My number one priority is to actively lead and manage HUD's Office of General Counsel in effectuating lasting transformational change in how the Office of General Counsel does business and how we interact with the affordable housing bar.

HUD is a large government organization with over 10,000 employees and is a creature of rules, processes and procedures, just like any government organization or large corporation. That doesn't mean that HUD can't be less bureaucratic and more accessible. We need to be able to move quickly to respond to questions from our program clients, from the external housing bar and from our program participants. The problem is not with our attorneys who are very competent and extremely dedicated to HUD's mission. Rather, the problem lies with the processes and protocols we have in place for interacting and communicating with the outside world.

So what is the solution? When I spoke to the HDLI conference in Tampa this past January, I spoke about a no-action letter process which we are still considering. Today we are devoting considerable energy to designing regulations to improve not only the no-action letter process, but the regulatory transparency process in general. Let me explain what I mean by "regulatory transparency" by providing you with a little history about my time as a securities lawyer and my interactions with the U.S. Securities and Exchange Commission.

As a former securities lawyer, I am intimately familiar with how the SEC interfaces with the securities bar. All filings by issuers with the SEC are publicly available on the Internet almost from the moment they are filed. That process began in 1994 and each year seems to improve with information being filed in a more timely manner and in a more thorough form. Recently, the SEC went a step further and made publicly available all letters to issuers and issuers' counsel prepared by SEC attorneys commenting on filings. Because there now exists this huge repository of precedent and because it is all publicly available, the securities bar is able to learn from and copy

each other. The logic and rationale of the SEC's decisions and behavior are more transparent.

When the SEC implemented the Sarbanes-Oxley Act of 2002, which mandated many new disclosure requirements by public companies and was the most significant change to this nation's securities laws since 1934, the securities bar was able to move quickly to implement the requirements since practitioners could see what each other was doing and what the SEC's reactions were to other practitioners' interpretation of the statute's requirements. The SEC also did a great job of interacting with the securities bar and making publicly available additional interpretative guidance when needed.

When I was a securities lawyer, if I had a client that wanted to proceed with a transaction, but it was unclear whether such a transaction was in compliance with the securities law because the law was ambiguous, I had the option as a securities lawyer of preparing a request for a no-action letter to the SEC. The no-action letter would explain to the SEC what my client was seeking to do, what the applicable law provided, what the SEC had said in previous no-action letters and why I thought the proposed transaction was in compliance with applicable law. The letter would seek the SEC's concurrence and their commitment not to recommend enforcement action against the client if the client proceeded with the transaction as described in the letter. It may also be the case that, during the course of preparing such a letter, I would discover that there were so many no-action letters almost exactly on point that I felt comfortable advising my client to proceed with the transaction without the need for the time-consuming and burdensome process, to the agency, myself and my client, of seeking a no-action letter.

I ask you – why can't we have a similar system of regulatory transparency at HUD? First, we need to understand why regulatory transparency is important. Regulatory transparency is the key to developing more effective and efficient regulation. Believe it or not, agencies don't always have the answer. Regulated entities have an enormous capacity to identify, understand and express views on their obligations under the law and they must be listened to. Increased participation by actors with varied experience and the subsequent

process of compromise by competing interests is the foundation of our successful and dynamic democracy.

To quote Justice Louis Brandeis: “Sunlight is said to be the best of disinfectants; electric light is the best policeman.” In my opinion, a regulatory process with greater participation and transparency:

- Increases predictability
- Fosters trust
- Raises the confidence of those regulated
- Promotes regulatory quality
- Increases compliance
- Reduces compliance friction
- Supports accountability
- Enables the regulated entities to have sufficient clarity to take action without fear of violating the law
- Leverages the private sector’s knowledge with no attendant cost to the government
- And, finally, is closely linked with the good governance agenda and demonstrates our continuing commitment to democracy

So what are the key elements of regulatory transparency and why are they important? The law must be accessible, the law must be intelligible and the rationale for the law must be comprehensible.

First, the proposal must be accessible. Regulated entities must have access, through physical and electronic means, to regulatory information prior to promulgation of final regulations and, where possible, in advance of the public comment period on the proposed regulations. Advance notice of proposed rulemaking provides early information on upcoming rulemakings, and open consultation processes. What is of paramount importance is giving regulated entities ample time to analyze and digest rules put before them for comment. That also means that the agency must take public comments seriously and be held accountable to ensure that valid concerns are addressed and don’t disappear into a file somewhere. Accessibility doesn’t just cover the period before the regulations take effect. Regulations in effect, and any related supplementary guidance, must be readily accessible to the public and regulated entities so that they can, not only access the regulations they may be

subject to, but analyze these regulations in the context of related regulations or supplementary regulatory material, and suggest improvements to the agency.

Second, the proposal must be intelligible. The ability to comment in advance of the publication of final regulations provides the opportunity for non-agency actors to help improve the quality of the proposed regulation by suggesting plain and easy to follow language which results in greater clarity and reduced ambiguity. Regulated entities bring to the table real world experience in implementing regulations we draft. Not only must the regulation be intelligible, but its application to unique and unprecedented situations must be determinable. The Office of General Counsel at HUD can achieve this through the issuance of guidance in the form of no-action letters, staff legal bulletins, interpretative letters and exemptive and waiver relief when appropriate. As I already illustrated with my discussion of the SEC, the existence of and ready access to guidance from HUD can be tremendously helpful to our program participants and beneficiaries.

Finally, the proposal must be comprehensible. By that I mean the agency must explain to the regulated entity the rationale behind the proposal – why is it needed and what purpose will it serve? This not only helps regulated entities understand the requirements they may be faced with, but it also allows the community and regulated entities to respond with their opinion on the necessity of the proposal and recommended alternatives. Sometimes, as you know, the proposal stems from statute and, at times, a statute can be very prescriptive and there is little discretion to be exercised by the agency. In addition, the agency should, for those rules that regulate conduct (and largely not directed to the flow of federal funds) justify the cost of the regulation by performing analyses of major regulatory proposals to determine if the benefits will exceed the costs and whether alternatives can achieve the same goal with less cost.

Communication is obviously a critical element of the process and it is achieved by consulting the regulated entities from the very start of the regulatory process, before the formal comment process begins. The Executive Order on Regulatory Planning and Review encourages early consultation with regulated entities. The communications,

however, need to continue after a rule is issued for effect. This is achieved through informal and formal guidance offered by the Office of General Counsel, training and briefing sessions on new regulations, and as wide a dissemination of information to as wide an audience as possible. Regulations have to be published in the Federal Register, but this is not always the most convenient source that members of the public go to for information about agency regulations - they go to the agency's website. Speaking as someone with a background in the technology industry, I am a firm believer that the Internet is an invaluable method for not only posting regulatory information, but also allowing regulated entities to easily search for advice prepared by OGC on implementing the regulations. The easy access to information reduces the pressure on OGC staff as well as the cost to regulated entities.

If we have a regulatory transparency process similar to that of the SEC, I believe that program participants would be able to engage in more transactions and more activities necessary to meet our housing needs but in less time and at a lower cost. Isn't that what we all want?

It should go without saying that HUD wants local housing authorities to take action, to be entrepreneurial and to spend their subsidies so as to improve their communities and increase the supply, quality and access to affordable housing. Of course, as lawyers, we also need to be comfortable that our clients' actions are in compliance with applicable law.

HUD needs to be more transparent with the housing bar. We need better processes to institutionalize and publicize our guidance through *active* disclosure. We also need better protocols for determining when our guidance should be issued in the form of a no-action letter, an interpretative letter, staff legal bulletin or through rulemaking.

That is where I want to go.

I understand that this project is extremely innovative and I fully expect it to be one of the largest undertakings of my tenure. I also understand that people may be skeptical that a federal agency,

especially an agency such as HUD, which has federal grant responsibilities in addition to regulatory responsibilities, can accomplish such a novel undertaking. Transparency can have its challenges:

- “Information monopolies” will need to be broken.
- There may be legal impediments to overcome.
- The process for informal guidance may be insufficient or inefficient and there may be a lack of access to the guidance once it’s produced.
- Regulated entities may not sufficiently share the information they possess.
- The potential for an increased work burden – in either time or money – may strike fear in those who have to implement new transparent processes.
- The goal may not be viewed by some as a top priority.
- There is always the issue that we, as attorneys, must make paramount – confidentiality of certain privileged information.
- There may be biases against transparency, territorial issues as to who should control the issuance of guidance or an insufficient understanding by the regulator as to the benefits of transparency.

These are issues that will not simply disappear, but we cannot let them deter us from moving forward. We’ve already seen the progress that can be made when able and committed individuals set their sights on the target. The Securities and Exchange Commission is to be commended for its success in improving regulatory transparency.

Those of you who already know me know that my style has never been, and never will be, to coast or to continue the status quo. And you’ve already heard from many of the senior attorneys in HUD’s Office of General Counsel – there’s no question that HUD has the talent to accomplish the task of establishing a system of open, honest and timely disclosure of public information.

Since I was sworn in as General Counsel, my office has made significant progress in achieving the goals I have outlined. We are overhauling the OGC website, making more information about laws

and regulations and existing statutory or regulatory guidance readily available and easy to find. With respect to a transparent regulatory *process*, draft regulations to establish such a process are in the development stage in the OGC Office of Legislation and Regulations.

The regulatory transparency process under consideration would offer participants in HUD programs the opportunity to seek informal legal guidance in the form of interpretative letters or no-action letters from HUD's Office of General Counsel. As I mentioned earlier, this is particularly helpful when HUD program participants find themselves confronting unique or complex situations or transactions which leave them uncertain as to how to comply with HUD statutory or regulatory requirements and cause them to fear exposure to penalties. The proposal under consideration would allow program participants and regulated entities to contact OGC directly to seek compliance guidance and OGC would be permitted to make available, especially via the Internet, the compliance guidance when issued. That way, when other program participants seek to engage in a similar or identical transaction that is not clearly addressed by statute or regulation, they can analyze past guidance from HUD to determine if they want to move forward with the transaction. In the model I've just described, program participants can engage in more transactions with more security, less risk and with fewer delays.

The move toward greater transparency in agency operations and decision-making isn't coming just from my office or HUD – this is an administration-wide policy. On December 14, 2005, President Bush signed an Executive Order, entitled "Improving Agency Disclosure of Information." It is the policy of this administration that QUOTE "The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed" END QUOTE. Agencies are directed to respond to FOIA requests courteously and appropriately. Moreover, agencies are to provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (on a website for example), and about the status of a person's FOIA request and appropriate information about the agency's response. Speaking for HUD, and as the Chief FOIA Officer for HUD, I can tell you that, with the support of President Bush and Secretary Jackson, we are making progress toward this

objective. At present we have an excellent staff within the Office of General Counsel who responds to FOIA requests, but we are working to be more proactive and less reactive.

It is my goal, consistent with the President's Executive Order, to make available and easily accessible as much public information as possible. Shining sunlight on the decision-making process at HUD will result in increased efficiency, lower transaction costs and improved resource allocation for both the agency and the housing market and I look forward to working with you and all of our partners to make this happen.

I would like to end by saying a few words about the Housing and Development Law Institute. It is amazing to me that even though HDLI is the only major organization for attorneys practicing in the affordable housing area many housing authorities are not members. Organizations like HDLI serve a vital purpose in helping us to fulfill the mission of increased access to affordable housing. It is like imagining doctors without the American Medical Association or law firm lawyers without the American Bar Associations. We need to do whatever we can to enhance the status of the affordable housing bar and most respected professions have respected and well organized trade associations through which to network, share ideas, facilitate continuing education opportunities and, through which, its members can purchase over-priced term life insurance. While HUD does not endorse specific organizations, like trade associations, I can ensure you that we will always be pleased and honored to participate in events sponsored by HDLI as well as those of other organizations with a similar charter to facilitate interaction among the affordable housing bar. As many of you know, for a number of years we have actively participated in the ABA Affordable Housing Forum. I plan to continue that kind of active participation and pursue similar opportunities for engagement with the affordable housing bar.

Even outside of these events organized by HUD, HDLI, the ABA or other organizations, we need to find more opportunities to network and exchange ideas. You are all incredibly important partners in what we do every day and we couldn't accomplish HUD's mission without you.

So I am very excited to be serving as General Counsel of HUD and very excited that I will have the opportunity to work with each of you as we work together to meet the challenges ahead and continue to provide more folks with more access to affordable housing.

Thanks again to the Housing and Development Law Institute for organizing and hosting this forum and thanks again to all of you for taking some time from your busy schedules to be here today to discuss and share ideas for how best to serve your housing authority clients and, more broadly, how we as lawyers can play our part in improving public housing within our country.

I look forward to working with all of you in the months and years ahead as we seek to improve the quality of, and access to, affordable housing.

Thank You.